

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HENRY RATCLIFF)	
Claimant)	
)	
VS.)	
)	
PAR ELECTRICAL CONTRACTORS, INC.)	
Respondent)	Docket No. 1,050,846
)	
AND)	
)	
OLD REPUBLIC INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the November 9, 2011 Review & Modification Award entered by Special Administrative Law Judge C. Stanley Nelson. The Board heard oral argument in Wichita, Kansas on February 17, 2012.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Brandon A. Lawson of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations contained therein.

ISSUES

The Special Administrative Law Judge (SALJ) denied claimant's application for review and modification of the October 29, 2010 Award. The SALJ found claimant failed to sustain his burden of proof that the 2010 Award should be modified.

Claimant requests review of whether the SALJ erred in denying claimant's request for work disability benefits based on a 100 percent wage loss and no task loss.

Respondent argues the SALJ's Award should be affirmed. Respondent contends that claimant's current receipt of temporary total disability (TTD) compensation as a result of another injury should prohibit an increase in claimant's award based on a 100 percent wage loss. Respondent maintains that, by definition, claimant may receive TTD only if he is "completely and temporarily incapable of engaging in any type of substantial and gainful employment."¹ Hence, respondent claims that if claimant is allowed to simultaneously receive both TTD and work disability benefits based on a 100 percent wage loss, it would result in claimant, in effect, receiving a "double recovery."

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact:

Claimant sustained a compensable personal injury by accident working for respondent on January 26, 2010. On the date of accident, claimant was approximately 35 years old. His accident occurred when he was ascending an electrical pole, slipped, and slid back down the pole, landing on his feet. As a result of the fall claimant sustained compression fractures at T12 and L1 as well as injury to his low back.

The parties settled the claim on an open award basis by settlement hearing before SALJ John C. Nodgaard on October 29, 2010. Claimant received a lump-sum payment of \$22,432.95, which represented a 10 percent permanent partial disability to the whole body. Under the award, all future rights, including specifically future medical compensation and review and modification, were left open. Claimant continued to work for respondent following the entry of the award.

However, claimant sustained another accident working for respondent on May 12, 2011, in which he injured his right forearm and right elbow. Claimant was taken off work on May 12, 2011, and has not worked since. Shortly after the May 12 event, claimant began receiving temporary total disability benefits by virtue of the right upper extremity injury in the amount of \$545 per week. As of the date of claimant's August 19, 2011 testimony, he continued to be off work and continued to receive TTD in the right upper extremity claim.

Effective May 19, 2011, claimant's employment with respondent was terminated due to a reduction in force. Claimant filed an application for review and modification on June 15, 2011, in which he requested an increase in the October 29, 2010 Award. In the application claimant alleged that he was entitled to receive a 50 percent work disability based upon a 100 percent wage loss and a 0 percent task loss.

¹ K.S.A. 44- 510c(b)(2).

Claimant testified that before his right upper extremity injury on May 12, 2011, he was earning the same pay as before the injury on January 26, 2010.²

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-528 provides in relevant part:

(a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

(b) If the administrative law judge finds that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is earning or is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or finds that the employee has absented and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer, or has departed beyond the boundaries of the United States, the administrative law judge may

² The parties have stipulated that claimant's pre-injury average weekly wage was \$1,600.

modify the award and reduce compensation or may cancel the award and end the compensation.

K.S.A. 44-510e(a) provides in relevant part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

CONCLUSIONS

The SALJ erred in denying claimant's review and modification application. As noted by the SALJ, there is no dispute as to the facts. Here, the issue requires interpreting and applying the provisions of K.S.A. 44-528 and K.S.A. 44-510e.

After the settlement hearing on October 29, 2010 claimant continued to work for respondent earning more than 90 percent of his pre-injury average weekly wage. Claimant's entitlement to permanent partial disability (PPD) benefits was therefore limited to his permanent impairment of function as determined by Judge Nodgaard at the settlement hearing (10 percent to the body as a whole) and claimant was prohibited under 44-510e from recovering work disability.

However, two changes of circumstances occurred one week apart. Claimant went from earning a comparable wage to earning no wage on May 12, 2011, when claimant sustained a work-related injury to his right upper extremity while working for respondent. Also, effective on May 19, 2011, claimant's employment with respondent was terminated due to a reduction in force.

On June 15, 2011, claimant filed an application to review and modify the original award, alleging “change in material circumstances due to lay off.”³ Insofar as the record reflects, respondent has not filed an application for review and modification.

Respondent maintains that the SALJ correctly found that claimant did not satisfy his burden of proving good cause under 44-528 to make a modification of the award appropriate. The SALJ found that under 44-528, “there must be some proof of task loss or accommodation as a result of the injury in connection with proving a wage loss because of a workers [sic] termination.”⁴ Respondent also contends that awarding claimant work disability benefits based a 100 percent wage loss at the same time claimant is receiving TTD by virtue of another injury would result in claimant receiving a double recovery. Respondent also argues that under 44-528(b), the trier of fact must determine claimant’s ability to earn wages and impute a wage to claimant.

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.⁵ If there is a change in claimant’s work disability, then the award is subject to review and modification.⁶ In a review and modification proceeding the burden of establishing the changed conditions is on the party asserting them.⁷ Our appellate courts have consistently held that there must be a change of circumstances, either in claimant’s physical or employment status, to justify the modification of an award.⁸ The change does not have to be a change in the claimant’s physical condition. It could be an economic change, such as a claimant returning to work at a comparable wage⁹, or losing a job because of a layoff.¹⁰

The Board finds that claimant’s receipt of TTD because he suffered a separate injury to a different part of his body does not affect his claim for work disability. Neither the SALJ nor respondent cite statutory or case law authority to support the notion that claimant’s receipt of TTD in a subsequent claim is at all material to the issues in this claim. The Board’s review of the Act’s wage statute (K.S.A. 44-511) reveals that TTD is not

³ Form K-WC E-5, application for review and modification.

⁴ SALJ Order (Aug. 19, 2011) at 10.

⁵ *Nance v. Harvey County*, 236 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

⁶ *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996)

⁷ *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

⁸ *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

⁹ *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997)

¹⁰ *Id.*

“money,” nor is it “additional compensation,” nor is it “wage” as those terms are defined.¹¹ Under the plain language of K.S.A. 44-510e, the statute which defines permanent disability benefits for non-scheduled injuries, work disability is based on an average of two factors: wage loss and task loss.¹² Wage loss is determined by comparing claimant’s post-injury earnings with claimant’s pre-injury average weekly wage.¹³ The TTD claimant was receiving by virtue of his right arm injury is not relevant to the calculation of claimant’s wage loss.¹⁴ There is no “double recovery” because the two claims are entirely separate and claimant is entitled to the benefits of the Act in both claims.

The Board is unpersuaded that K.S.A. 44-528(b) requires the trier of fact to determine claimant’s capacity to earn wages and impute a wage to claimant. *Bergstrom*¹⁵ and more recently *Tyler*¹⁶ require that when the provisions of the Act are plain and unambiguous, the courts must give effect to the express language of the statute rather than determine what the law should or should not be. If the statutory language is clear, there is no need to resort to statutory construction or speculate on legislative intent. *Bergstrom* and *Tyler* also instruct that, in determining wage loss under 44-510e, there need be no inquiry why the claimant sustained a loss of earnings and there need be no nexus between the injury and the wage loss.

Here, claimant experienced a 100 percent wage loss on May 12, 2011, when he suffered an injury to his right arm. Even if the arm injury had not occurred, claimant’s wage loss would likely have increased to 100 percent anyway because his employment was terminated on May 19, 2011. Neither the right upper extremity injury nor the termination of claimant’s employment occurred because of claimant’s January 26, 2010 back injury; however, under *Bergstrom* and *Tyler*, the cause of the wage loss is immaterial.

Respondent relies on subsection (b) of 44-528, but by its plain language, it is inapplicable to this claim. Subsection (b) clearly provides that, if one of the conditions enumerated therein occurs, the administrative law judge may: (1) modify the award and reduce compensation, or (2) cancel the award. Those issues were not before the SALJ,

¹¹ K.S.A. 2009 Supp. 44-511(a)(1)(2)(3).

¹² *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 259, 211 P.3d 175 (2009) rev. denied ____ Kan. ____ (2010).

¹³ See *Nisler v. Footlocker Retail, Inc.*, 40 Kan. App. 2d 831, 196 P.3d 395 (2008).

¹⁴ It is noted parenthetically that the credit provisions of K.S.A. 44-510a are inapplicable because the credit does not apply to TTD and because there is no contribution of the prior disability to the back to the current disability to the right upper extremity.

¹⁵ *Bergstrom v. Sears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

¹⁶ *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

nor are they before the Board. Respondent has not applied for review and modification requesting that the compensation awarded claimant should be reduced or the award cancelled. The language of 44-528(b) “must apply to an employer’s application for modification because it provides for a reduction or cancellation of an award.”¹⁷ The only issue raised was whether claimant is entitled to work disability benefits by reason of his wage loss.

The definition of permanent partial disability in K.S.A. 44-510e applies to pre- and post-award determinations of permanent partial disability.¹⁸ In *Asay*,¹⁹ the court held that the language in 44-528(b) dealing with the capability of an employee to earn the same or higher wages does alter the test for determining permanent partial disability under the then applicable version of 44-510e.

The Board finds that claimant has sustained his burden to prove good cause to modify the October 10, 2010 Award. The change of circumstances consisted of the reduction of claimant’s post-injury earnings from an amount within 10 percent of claimant’s pre-injury average weekly wage to no earnings. The effective date of the change was May 12, 2011. Claimant is entitled to an increase in permanent partial disability benefits from the 10 percent functional impairment originally awarded to a 50 percent work disability (100 percent wage loss plus no task loss, divided by two, equals 50 percent), in accordance with the computations below.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²⁰ Accordingly, the findings and conclusions set forth above reflect the majority’s decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Review & Modification Award of SALJ C. Stanley Nelson dated November 9, 2011, is reversed and claimant is awarded additional PPD for a 50 percent work disability, as specifically set forth herein.

¹⁷ *Serratos v. Cessna Aircraft Co.*, 253 P.3d 798, 2011 WL 2637449 (No. 104,106 Kansas Court of Appeals unpublished opinion filed July 1, 2011).

¹⁸ *Ramey v. Cessna Aircraft Co.*, 259 P.3d 749, 2011 WL 4035762 (No. 104,819 Kansas Court of Appeals unpublished opinion filed September 9, 2011).

¹⁹ *Asay v. American Drywall*, 11 Kan. App. 2d 122, 715 P.2d 421, *aff’d* 240 Kan. 52, 726 P.2d 1332 (1986).

²⁰ K.S.A. 2010 Supp. 44-555c(k).

Claimant is entitled to 19.14 weeks of temporary total disability compensation at the rate of \$546 per week or \$10,450.44 followed by 41.09 weeks of permanent partial disability compensation at the rate of \$546 per week or \$22,435.14 for a 10 percent functional disability plus permanent partial disability compensation commencing May 12, 2011, at the rate of \$546 per week not to exceed \$100,000 for a 50 percent work disability.

As of March 26, 2012, there would be due and owing to the claimant 19.14 weeks of temporary total disability compensation at the rate of \$546 per week in the sum of \$10,450.44 plus 86.81 weeks of permanent partial disability compensation at the rate of \$546 per week in the sum of \$47,398.26 for a total due and owing of \$57,848.70, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$42,151.30 shall be paid at the rate of \$546 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of March, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Brandon A. Lawson, Attorney for Respondent and its Insurance Carrier
C. Stanley Nelson, Special Administrative Law Judge